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HOFER
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& LIONE

Our Case No. 659/1095
K-C Ref. No. 18945

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:

Van Gompel, et al.

Serial No.: 10/624,333

Filing Date: July 22, 2003

For: **DISPOSABLE UNDERGARMENT
HAVING A SLIT**

Examiner: Gibson, Keshia L.

Unit No.: 3761

APPELLANTS' BRIEF

MS APPEAL BRIEF - PATENTS
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This is an appeal from the Final Rejection dated September 29, 2005 of Claims 1-14 and 28-31.

(1) REAL PARTY IN INTEREST

The inventors assigned their interests in the invention to Kimberly-Clark Worldwide, Inc. The real party in interest is Kimberly-Clark Corporation, which is the corporate parent of Kimberly-Clark Worldwide, Inc.

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(3) RELATED APPEALS AND INTERFERENCES

There are no known appeals or interferences that will directly affect or be directly affected by or have a bearing on this appeal.

(4) STATUS OF CLAIMS

Claims 1-14 and 28-31 are pending in the above-referenced application. Claims 15-27 were previously cancelled. Claims 1-14 and 28-31 (Appendix A) have been rejected.

(5) STATUS OF AMENDMENTS

The rejected claims (Appendix A) are in the form as referred to in the Final Rejection of September 29, 2005.

(6) SUMMARY OF CLAIMED SUBJECT MATTER

In general, the present invention relates to an improved disposable absorbent undergarment, such as infant diapers, training pants and adult incontinence garments. With reference to independent claim 1, the disposable undergarment includes a front body panel 4 having a pair of opposite first laterally spaced side edges 30, 32, a first waist edge 20 and a first crotch edge 14 longitudinally spaced from the first waist edge (Specification at 3, lines 26-28; at 8, lines 18-26; FIGS. 6, 8 and 10). A rear body panel 6 has a pair of opposite laterally spaced second side edges 30, 32, a second waist edge 28 and a second crotch edge 22 longitudinally spaced from the second waist edge (Specification at 3, lines 28-31; at 8, lines 18-29; FIGS. 6, 8 and 10). The first and second crotch edges 14, 22 are longitudinally spaced from each other, and at least one of the first and second crotch edges has at least one

longitudinally extending slit 104 formed therein (Specification at 3, line 31 to 4, line 2; at 16, lines 10-15; at 24, lines 6-10; FIGS. 8 and 10). A crotch member 50 is connected to the front and rear body panels and covers the at least one slit (Specification at 4, lines 2-3; at 16, lines 13-15; at 25, lines 2-3; FIGS. 8 and 10).

With reference to dependent claim 2, the crotch member is connected to a garment side surface 12 of each of the front and rear body panels (Specification at 22, lines 19-22). In another embodiment, the crotch member is connected to a body side surface 10 of at least one of the front and rear body panels (Specification at 22, lines 22-25).

The slit 104 formed in one or both of the crotch edges of the front and rear body panels provides significant advantages. In particular, the slit reduces the force required to elongate the body panels as the garment is applied to the user (Specification at 4, lines 11-16; at 25, lines 11-29). In addition, the slit, when opened, provides access to the crotch member secured to a garment side surface of a body panel, or allows the crotch member to expand away from the body of the user if secured to the body side surface of the body panel (*id.*).

The crotch member 50 can be secured to the body panels in different ways so as to maximize the utility of the slit. For example, and with reference to dependent claim 5, the crotch member can include opposite sides and at least one fold 118 formed along each of the sides, with the folds connected to at least one of the front and rear body panels on opposite sides of the slit (Specification at 22, line 30 to 23, line 3; FIGS. 26 and 27). In another configuration, and with reference to claim 12, the crotch member is minimally attached to the front and rear body panels along a longitudinally extending centerline 88 (Specification at 22, lines 19-23; at 23, lines 7-10).

With reference to claim 28, the crotch member has first and second longitudinal spaced terminal edges 60, 62, which are further longitudinally spaced from the first and second crotch edges respectively (Specification at 15, lines 10-12; FIGS. 6, 8 and 10). With reference to claim 30, the front and rear body panels each include at least a first and second layer, wherein the slit is formed through at least the first and second layers (Specification at 13, lines 21-23; FIGS. 9 and 11).

(7) GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

The Examiner rejected: (1) claims 1-8 and 13-14 under 35 USC 102(b) as being anticipated by U.S. Patent No. 5,873,868 to Nakahata (Nakahata I); (2) claims 1-3, 5-8 and 12-14 under 35 USC 102(e) as being anticipated by WO 03/003961 A1 to Nakahata (Nakahata II);¹ (3) claims 28-30 under 35 USC 102(b) as being anticipated by U.S. Patent No. 3,895,629 to Snyder; (4) claims 38-31 under 35 USC 102(b) as being anticipated by U.S. Patent No. 5,843,065 to Wyant; and (4) claims 9-11 under 35 USC 103(a) as being made obvious over Nakahata I or II.

(8) ARGUMENT

1. Claims 1-8 and 12-14 Are Not Anticipated By Or Made Obvious Over Nakahata I or II²

Claim 1:

The Examiner has rejected independent claim 1 as being anticipated by U.S. Patent No. 5,873,868 to Nakahata (Nakahata I) and WO 03/003961 A1 to Nakahata (Nakahata II).

¹ Applicants submit that the rejection over WO 03/003961 A1 is more accurately applied under 35 USC 102(a).

² Applicants hereby argue separately the patentability of rejected claims 1, 2, 5, 12, 28 and 30.

Applicants submit that Nakahata I and II fail to disclose all of the recitations of claim 1, and that the rejections should be overcome for at least the following reasons.

As a threshold matter, claim 1 recites “a front body panel comprising a pair of opposite first laterally spaced side edges, a first waist edge and *a first crotch edge longitudinally spaced from said first waist edge*; a rear body panel comprising a pair of opposite laterally spaced second side edges, a second waist edge and *a second crotch edge longitudinally spaced from said second waist edge*, wherein *said first and second crotch edges are longitudinally spaced from each other.*”

In contrast, Nakahata I and II disclose absorbent articles having a chassis that runs from one waist edge of the garment to the other (Nakahata I at FIGS. 1, 2, 4; Col. 3, lines 3-50; Nakahata II at 1, 2, 4, and 5; page 4). Nowhere does Nakahata I or II disclose or suggest a three-piece garment having front and rear body panels with spaced apart “crotch edges,” and a connecting crotch member.³

As clearly disclosed by Applicant, the term “edge” refers to the termination of a component, not some theoretical line or boundary (Specification at 16, lines 10-15; FIGS. 8 and 10). Indeed, the use of the same term in the phrase “waist edge” further supports this as the only reasonable interpretation. In this way, Applicants fundamentally disagree with the Examiner’s interpretation of “edge” as being merely a theoretical line. Such an interpretation is in direct contravention of the teachings of the specification and the use of that term in the claims.

³Contrary to the Examiner’s assertions (Office Action at 12-13, para. 10), claim 1 does recite separate front and rear body panels having first and second crotch edges that are “longitudinally spaced.”

Applicants note that the Examiner refers to the recitation in Nakahata I of first and second waist regions 46, 44 and a crotch region 48 (Col. 3, lines 22-25). Nowhere, however, does Nakahata disclose or suggest that those regions are bounded by edges, or are formed from separate components. Indeed, the use of the term “region” denotes that a single panel is being described, not components having edges. Likewise, Nakahata II discloses that the “chassis layer 21 preferably comprises a continuous sheet or web which defines the first waist panel 43, the second waist panel 45 and the crotch panel 47 (Nakahata II at 6).⁴ Indeed, even the Examiner acknowledges that Nakahata I and II disclose that each of the layers is formed from a “continuous” sheet, such that each of the front panel, crotch region and back panel are connected to each other (Office Action at 5 and 14 (discussing claim 7)).

Nakahata I and II also both disclose that the chassis has a periphery defined by side edges 50 and end edges 52 (Nakahata I at Col. 3, lines 25-34; Nakahata II at page 4), demonstrating that Nakahata also knew the meaning of the term “edge.” Revealingly, Nakahata I and II do *not* refer to the waist and crotch *regions* or panels as having any terminal crotch *edges* at the boundaries between those regions. Accordingly, the Examiner’s designation of “crotch edges E” along theoretical lines is not supported by the cited references when properly interpreting the term “edge.” Indeed, Applicants submit that Nakahata I and II teach against such a construction by reference to a “continuous” chassis that extends from one waist edge to the other.

Applicants acknowledge that Nakahata II also discloses that the waist panel 43 may comprise only the outer sheet 23, while the other waist panel 45 and crotch panel 47 include the outer sheet 23 and inner sheet 26 (Nakahata II at 7). In such an embodiment, however,

all of the panels are made up of the outer sheet, which does not present any “crotch” edges, and neither of the “waist” panels has a crotch edge – at most the crotch portion has a crotch edge.

In another embodiment, Nakahata II discloses that the chassis layer 21 can comprise different pieces of material, but they are joined to form the continuous chassis layer, again without edges (Nakahata II at 7). Moreover, even in this embodiment, the film extends through the second waist panel 45 and the crotch panel 47, meaning that the layer does not present a “crotch edge” for the second waist panel (*id.*).

Applicants further submit that the Examiner’s mark-up of FIG. 4 from Nakahata II (Office Action at 7) is merely speculative. Indeed, an overlay of FIG. 2 with FIG. 4 shows the line between regions 43 and 47 falling below the slits, not through them as asserted by the Examiner. Consistent with that disclosure, Nakahata II discloses that the “*first waist panel 43 includes a pattern 204 of discrete, spaced apart discontinuities defined by a plurality of rectilinear cuts or slits 206 that are regularly disposed in the chassis layer 21 and that extend through the chassis layer 21*” (Nakahata II at 9, lines 7-9 (emphasis added)), thereby implying that the slits are all positioned in the region defined by the panel. Alternatively, Nakahata II discloses that the slits 204 may be provided in *only a portion* of the panel 43 or *in a portion* of the crotch panel 47 (Nakahata II at 9, lines 10-13), not both. As such, Nakahata II not only fails to disclose or suggest that the slits are formed *in the edge* of the body panels as recited in claim 1, but actually teaches away from such a construction.

For these reasons, Nakahata I and II fail to disclose all of the recitations of claim 1 and the Examiner should withdraw her rejections on this basis alone.

However, even if the theoretical lines drawn the Examiner are misconstrued as “edges,” there is no disclosure that the crotch member *covers* the at least one slit as recited in claim 1. As disclosed in the specification, the term “cover” means to lie over or overlay (Specification at 24, lines 9-10; FIGS. 8 and 10).

In essence, the Examiner cannot have it both ways, if the lines “E” define the edge of the waist regions, then under the Examiner’s interpretation, the lines “E” also define the edges of the crotch member (region 48 as applied by the Examiner in Nakahata I and panel 47 as applied by the Examiner in Nakahata II). Therefore, and contrary to the Examiner’s assertion, the region 48 of Nakahata I clearly does not *cover* any slit formed in either of the *theoretical edge of the waist region 46 or 44*, as recited in claim 1. Indeed it is not possible since the regions share the same “edge” and do not overlap, i.e., one does not “cover” the other.

Likewise, the crotch panel 47 of Nakahata II does not cover the slit formed in any theoretical edge of the crotch panel 43, since those panels also share the same edge and do not overlap. In essence, for the crotch member to *cover* the slit, it must necessarily extend past the edge of the waist region/panel. In both references, however, the chassis is continuous, and the crotch member, as applied by the Examiner, terminates at the edges of the front and rear waist regions.

Accordingly, Nakahata I and II fail to disclose or suggest all of the recitations of claim 1 for this additional reason.

Claim 2:

Referring to claim 2, it does not make sense that a crotch panel is “inherently connected” to a garment side “surface” of front and rear body panels, when the layers are

admittedly formed as “continuous sheets” (Office Action at 5, 14). There simply is no disclosure that the crotch member overlies and is connected to the *garment side surface* of the waist regions in Nakahata I or II. It is beyond the pale to assert that since a continuous sheet forms two regions, one of the regions is attached to a garment side *surface* of the other region. Indeed, just the opposite is true – a continuous layer cannot possibly be secured to an outer *surface* of itself unless the material were folded over on itself, which Nakahata I and II do not teach.

Claim 5:

With reference to claim 5, there is no disclosure that the *folds* of the crotch portion are connected to the waist regions, as shown for example in FIGS. 26 and 27 of the present application. The Examiner again goes beyond the pale in interpreting gathered portions of the sides 50 as being secured to the body panel portion. Indeed, as set forth above, the crotch region of Nakahata I and II does not overlap with the front and rear body panel portions, thereby precluding any notion that some portion of the gathered portion of the crotch region is secured to the front and rear body panel regions.

Claim 12:

With reference to claim 12, there is no disclosure that a “longitudinally extending centerline” of the crotch portion is connected to the body panel regions. As set forth above, the crotch region of Nakahata II does not overlap with the front and rear body panel portions, thereby precluding any notion that a longitudinally extending centerline portion of the crotch region is secured to the front and rear body panel regions.

2. Claims 28-30 Are Not Anticipated by Wyant or Snyder

Claim 28:

Claim 28 recites that “said crotch member comprises first and second longitudinal spaced terminal edges, wherein said first and second terminal edges are longitudinally spaced from said first and second crotch edges respectively.” Revealingly, the Examiner did not reject claim 28 over either of the Nakahata I or II references, thereby further validating Applicants arguments above – namely that even if the lines “E” are interpreted as edges, the crotch region cannot overlie the front and rear body panels, or be connected to a garment side or body side *surface* thereof.

Conversely, the Examiner surprisingly rejected claim 28 as being anticipated by Wyant or Snyder, but did not reject claim 1 over either of those references. Surely if dependent claim 28 is anticipated by Wyant or Snyder, then independent claim 1 is also anticipated by those same references. In any event, Applicants submit that Wyant and Snyder fail to disclose or suggest all of the limitations of claim 28, expressly or inherently.

As a threshold matter, Wyant suffers the same deficiencies as the Nakahata I and II references – there is no front and rear body panels having a crotch edge (Wyant refers to “sections” at Col. 2, lines 18-20; 55-66, all made from the same continuous layers). Indeed, even if the Examiner were to read the lateral top of the T-shaped slit disclosed in Wyant as forming one edge, there is no other crotch “edge” longitudinally spaced therefrom as recited in claim 28 by way of claim 1. Accordingly, Wyant fails to disclose all of the limitations of claim 28 and the Examiner’s rejection should be withdrawn.

With respect to Snyder, the dressing 70 is *never* “connected” to either of the front and back garment sections 10 and 12, contrary to the recitations of claim 28 by way of claim 1.

Indeed, the configuration of the dressing, and the entire premise of Snyder, mandates that the dressing 70 be removable without having to remove the tubular instrument 80 (Col. 4, lines 12-55). In this way, the dressing 70 surrounds the tubular instrument, which extends through the aperture 68 formed by the panels (Col. 4, lines 1-15). Importantly, the dressing must be free of any connection to the panels so that it can be moved sideways relative to the tubular instrument (*id.*).

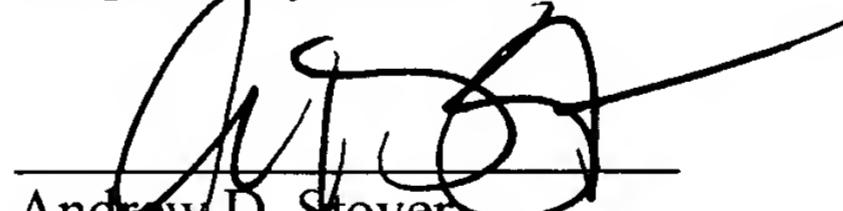
Claim 30:

Claim 30 also depends from claim 1, and therefore distinguishes over Wyant and Snyder for all of the same reasons set forth above with respect to claim 28.

4. Conclusion

The cited references do not provide a valid basis for an anticipation rejection or a *prima facie* obviousness rejection of the present claims. Accordingly, Appellants submit that the present invention is fully patentable over the cited references, and the Examiner's rejections should be REVERSED.

Respectfully submitted,



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APPENDIX A

The claims at issue in this appeal are as follows:

1. A disposable undergarment comprising:
a front body panel comprising a pair of opposite first laterally spaced side edges, a first waist edge and a first crotch edge longitudinally spaced from said first waist edge;
a rear body panel comprising a pair of opposite laterally spaced second side edges, a second waist edge and a second crotch edge longitudinally spaced from said second waist edge, wherein said first and second crotch edges are longitudinally spaced from each other, and wherein at least one of said first and second crotch edges comprises at least one longitudinally extending slit formed therein; and
a crotch member connected to said front and rear body panels and covering said at least one slit.
2. The disposable undergarment of claim 1 wherein said front and rear body panels each comprise a body side surface and a garment side surface, and wherein said crotch member is connected to said garment side surface of each of said front and rear body panels.
3. The disposable undergarment of claim 1 wherein said crotch member comprises a top sheet, a back sheet and a retention portion disposed between said top sheet and said back sheet, wherein at least one of said top sheet and said back sheet comprises an elastic material.
4. The disposable undergarment of claim 1 wherein said first and second crotch edges comprise a first and second longitudinally extending slit formed therein respectively, wherein said crotch member covers said first and second slits.
5. The disposable undergarment of claim 1 wherein said crotch member comprises opposite sides and at least one fold formed along each of said opposite sides,

wherein said at least one fold on said opposite sides are connected to at least one of said front and rear body panels on opposite sides of said slit.

6. The disposable undergarment of claim 1 wherein said at least one of said front and rear body panels comprising said at least one slit comprises an elastic material and is expandable between at least a first and second condition, wherein a pair of edges defining said slit are substantially abutted when said at least one of said front and rear body panels comprising said elastic material are in said first condition, and wherein said pair of edges defining said slit are separated when said at least one of said front and rear body panels comprising said elastic material are in said second condition.

7. The disposable undergarment of claim 6 wherein said crotch member is connected to said at least one of said front and rear body panel comprising said at least one slit when said at least one of said front and rear body panel comprising said slit is in said second condition.

8. The disposable undergarment of claim 6 wherein said crotch member is connected to said at least one of said front and rear body panel comprising said at least one slit when said at least one of said front and rear body panel comprising said slit is in said first condition.

9. The disposable undergarment of claim 1 wherein said front body panel has a first length defined between said first waist edge and said first crotch edge, and wherein said rear body panel has a second length defined between said second waist edge and said second crotch edge, and wherein said slit has a third length, wherein said third length is between about 5% and about 75% of at least one of said first and second lengths.

10. The disposable undergarment of claim 9 wherein said third length is between about 10% and about 50% of said at least one of said first and second lengths.

11. The disposable undergarment of claim 10 wherein said third length is between about 15% and about 30% of said at least one of said first and second lengths.

12. The disposable undergarment of claim 1 wherein said crotch member is minimally attached to said front and rear body panels along a longitudinally extending centerline of said crotch member.

13. The disposable undergarment of claim 1 further comprising at least one fastener member connected to at least one of said front and rear body panels and releasably engaging the other of said front and rear body panels.

14. The disposable undergarment of claim 13 wherein said at least one fastener member comprises a pair of fastener members connected to said at least one of said front and rear body panels along one of said pair of opposite laterally spaced first and second side edges.

28. The disposable undergarment of claim 1 wherein said crotch member comprises first and second longitudinal spaced terminal edges, wherein said first and second terminal edges are longitudinally spaced from said first and second crotch edges respectively.

29. The disposable undergarment of claim 28 wherein said crotch member comprises a top sheet and a back sheet defining said first and second terminal edges, and an retention portion disposed between said top sheet and said back sheet.

30. The disposable undergarment of claim 1 wherein said slit is formed through an entire thickness of said at least one of said first and second crotch edges.

31. The disposable undergarment of claim 30 wherein said front and rear body panels each comprises at least a first and second layer, wherein said at least one slit is formed through said at least said first and second layers.

APPENDIX B (EVIDENCE APPENDIX)

NONE

APPENDIX C (RELATED PROCEEDINGS APPENDIX)

NONE



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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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Filed: July 22, 2003

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Attorney Docket No.: 659-1095

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Examiner: Gibson, Keshia
L.

Art Unit: 3761

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 Please charge Deposit Account No. 23-1925 in the amount of \$____. A copy of this Transmittal is enclosed for this purpose.
 Payment by credit card in the amount of \$____ (Form PTO-2038 is attached).
 The Director is hereby authorized to charge payment of any additional filing fees required under 37 CFR § 1.16 and any patent application processing fees under 37 CFR § 1.17 associated with this paper (including any extension fee required to ensure that this paper is timely filed), or to credit any overpayment, to Deposit Account No. 23-1925.

Respectfully submitted,

Andrew D. Stover (Reg. No. 38,629)

February 27, 2006
Date

